ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DAVID M. GLOVER, JUDGE

DIVISION I

CA06-1185

May 9, 2007

JERRY SWINK	APPELLANT	APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [F402644]
V.		
RICELAND FOODS & LIBERTY MUTUAL	APPELLEES	AFFIRMED

In this workers' compensation case, appellant, Jerry Swink, suffered an admittedly compensable injury on September 16, 2003, when he fell and hit his neck on the guardrail of a spider climber he was riding into the air to unstop a trash pipe. Appellees, Riceland Foods and Liberty Mutual Insurance (collectively "Riceland"), accepted this injury as compensable until September 15, 2004, at which time they controverted any further treatment. At the hearing before the ALJ, Swink contended that he remained symptomatic as a result of the compensable injury and that he needed cervical-fusion surgery, as recommended by his treating physician, Dr. Reza Shahim. Swink sought payment of medical expenses; temporary-total-disability benefits from July 28, 2005, to a date yet to be determined; and attorney's fees. Riceland contended that the claim was accepted as a temporary aggravation of a previous 2002 cervical fusion; that Swink was treated and released for the 2003 injury with no impairment; and that any additional

treatment was unrelated, unreasonable, and unnecessary. The ALJ found that Swink's September 2003 compensable neck injury combined with his preexisting neck conditions of disc fusion and degeneration to produce a compensable injury; that the second fusion surgery was reasonable and necessary for the treatment of that compensable injury; that Swink was entitled to temporary total disability benefits from July 28, 2005, to a date yet to be determined; and that Swink was entitled to an attorney's fee.

Riceland appealed the ALJ's decision to the Commission, which reversed the ALJ's grant of benefits to Swink, finding that Swink had failed to prove that Dr. Shahim's surgical treatment was reasonably necessary in connection with his injury or that he was entitled to temporary-total disability. Swink now appeals, arguing that the Commission's decision is not supported by substantial evidence. We affirm.

Standard of Review

In workers' compensation cases, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms the decision if it is supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty, supra.* It is the Commission's

province to determine witness credibility and the weight to be given to each witness's testimony. *Johnson v. Riceland Foods*, 47 Ark. App. 71, 884 S.W.2d 626 (1994).

In a workers' compensation case, it is the claimant's burden to prove by a preponderance of the evidence both that his claim is compensable and that there is a causal connection between the work-related accident and the later disabling injury. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 19 S.W.3d 36 (2000). The determination of whether the causal connection exists is a question of fact for the Commission to determine. *Id.*

Hearing Testimony

At the hearing, Swink testified that he was injured when he was thrown against the guardrail of a "spider climber" at work. Swink said that the next morning he could hardly move his neck, and he told his foreman about it at that time. Swink said that the pain, which he described as bad and very sharp at times, was in his left shoulder, through the left side of his chest and back, behind his arm, in between his shoulder blades, and all the way up his neck, and that he could hardly hold his head upright.

Swink admitted that he had previous non-work-related neck problems in 2002 and had two surgeries that year, an ulnar-nerve transposition and a C5-6 fusion. He said that he was told by the doctor who performed the fusion, Dr. Reza Shahim, that he also had some arthritic spurs that could not be removed. Swink said that he returned to work about four weeks after the fusion surgery and did "pretty well" until the accident in September 2003. He said that after the 2003 accident, he went to the hospital in Stuttgart, where x-rays were taken, and he was then seen by Dr. Charles Pearce, an orthopedic

surgeon. Dr. Pearce referred Swink to Dr. Shahim, and Dr. Shahim sent him to Dr. Carl Covey to get an injection in his neck, which Swink said did not seem to help much. However, Swink stated that he did get some relief from the pills prescribed by Dr. Covey.

Swink said that he saw Dr. Shahim on April 14, 2004, and that Dr. Shahim said that Swink had a C6-7 problem that he could treat with surgery, although surgery would only take care of some of the problem. Swink had this surgery in July 2005, but he explained that he had to have two thyroid surgeries prior to having the C6-7 surgery performed.

Between April 2004 and July 2005, Riceland sent Swink to Dr. Wayne Bruffett for a second opinion, and Dr. Bruffett referred him to Dr. Brent Sprinkle for more injection therapy. Swink said that Riceland indicated in September 2004 that it would not pay for additional treatment. Swink explained that he was better after the July 2005 C6-7 surgery and was taking less medication, but that he was still not able to work because he "can't keep [his] mind on stuff." Swink denied injuring himself in any way from the time Dr. Shahim originally recommended surgery in April 2004 until the time the surgery was performed in July 2005. However, he did admit that he had driven a truck off into a ditch during that time, although he said that did not cause him any pain or problems.

On cross-examination, Swink testified that his need for the first fusion surgery in 2002 was not work related. He stated that he was in pain from the 2003 accident, and that he was still sore even after the second surgery. Swink said that Dr. Shahim told him that it would get better, although there were some things, like arthritis, for which nothing

could be done. Swink said he still had some problems and did not know how long they would continue. He stated that he underwent a functional capacity evaluation, which determined that he could work but that he could not lift forty pounds over his head.

Swink said that after he saw Dr. Shahim in 2004, Riceland sent him to Dr. Bruffett for a second opinion. He told Dr. Bruffett that he did not want to have surgery unless he just had to, and Dr. Bruffett told him that he would not suggest surgery at that time. Swink testified that when he got the second opinion, he was hoping to avoid having surgery, but that when he returned to Dr. Shahim in December, he was still having the same problems he had been having all along. He said that the surgery relieved some of the problems, but that they came back when he worked. Swink said that Dr. Sprinkle had told him that surgery would only make his problem worse, and he guessed that Dr. Sprinkle was right.

Medical Evidence

After the 2003 accident, Swink was seen by Dr. Charles Pearce on October 9, 2003. Because Swink had had cervical-fusion surgery in 2002, Dr. Pearce thought that Swink needed to be evaluated further by his surgeon, Dr. Shahim, and Dr. Pearce requested that Swink be referred to him. An October 20, 2003 x-ray revealed evidence of the C5-6 fusion surgery, as well as mild disk bulges at C3-4, C4-5, C6-7, and foraminal stenosis at C6-7 due to uncovertebral spurs.

Dr. Shahim saw Swink on December 11, 2003, and he noted that Swink continued to complain of neck and shoulder discomfort. Dr. Shahim reviewed an MRI obtained on

Swink, which he said showed a disc herniation at C6-7. Dr. Shahim ordered a CT cervical myelogram, taken on January 8, 2004, which showed posterior osteophytes at the inferoposterior end plate of C6 and superior-posterior end plate of C7; diffuse degenerative facet hypertrophic changes; anterior end plate and screw fixation at the C5-6 level with partial solid bony union; mild relative decrease in CSF space at the C6-7 level; and no focal herniated nucleus pulposus. Dr. Shahim's office note of January 12, 2004, indicated that Swink had foraminal stenosis at C6-7, which was caused by ligamentous hypertrophy and disc herniation at that level. He further noted that Swink had mainly axial symptoms that were brought on by an injury and that he preferred to treat him conservatively, recommending trigger-point injections and cervical epidural steroid injections.

Swink began seeing Dr. Carl Covey, a pain-management specialist, in February 2004. However, Swink testified that the injection did not seem to help much.

In April 2004, Dr. Shahim noted that Swink complained of posterior neck pain, interscapular pain, and pain radiating to both shoulders. He reviewed the cervical myelogram again and noted that Swink had nerve-root compression at C6-7 bilaterally and that there was anterior thecal-sac compression indicated on the myelogram adjacent to the C5-6 fusion. Dr. Shahim stated that he had given Swink the option of undergoing a cervical diskectomy and fusion at C6-7, and that because of the severity of the pain, Swink wanted to pursue the surgery option.

Swink was seen by Dr. Wayne Bruffett in June 2004 for a second opinion. Dr. Bruffett noted that Swink's main complaint was neck pain radiating into his upper thoracic region. Dr. Bruffett reviewed a myelogram performed on Swink prior to his work injury, which indicated degenerative changes and spurring at C5-6 and decreased filling of the nerve-root sleeve in the foramen on the left side of C6-7. He also reviewed the January 2004 myelogram and stated that Swink's surgery at C5-6 looked great, and that he could not see any evidence of a focal disc herniation, although he did see some generalized degenerative changes at other levels. Dr. Bruffett noted some blunting of the filling of the nerve-root sleeves bilaterally at C6-7, but he did not see any specific nerve-root cutoff.

Dr. Bruffett noted that Swink had been managed nonsurgically for his injury up to this point, but that in April 2004, consideration had been given to an anterior cervical diskectomy and fusion because of an inability to improve symptomatically, and Swink wanted to proceed with the surgery. He noted that he talked to Swink about the surgery and told him that the surgery might be helpful, but that it was an operation primarily for arm pain, and that while the neck pain could certainly improve after that type of surgery, there was also a chance that Swink could endure the operation and still have symptoms just as bad as he was now having, as well as other complications, such as esophageal or tracheal injury or bleeding. Dr. Bruffett stated that Swink did not really want to proceed with the surgery, but he left the final decision up to Swink. He recommended that Swink try further physical therapy to see if there was anything that could help with his symptoms.

Swink was referred to Dr. Brent Sprinkle, a physical-medicine and rehabilitation specialist, who arranged an EMG study. Dr. Sprinkle noted that he did not see any evidence of cervical radiculopathy on the EMG, although there was evidence of median and ulnar-nerve entrapment bilaterally, which could explain sensory hand complaints, but that this problem would not have been caused by Swink's work-related injury. In August 2004, Dr. Sprinkle stated that he saw no evidence to suggest that surgery would have any significant improvement in Swink's symptoms and had significant potential to make his neck pain worse. On September 14, 2004, Dr. Sprinkle determined that Swink was at maximum medical improvement from a nonsurgical standpoint, and he did not know what else to do to attempt to alleviate Swink's symptoms. Dr. Sprinkle noted that Dr. Bruffett's notes indicated that without any clear radicular pain, Dr. Bruffett was not confident that surgery at C6-7 would reduce Swink's symptoms, and Dr. Sprinkle concurred in that opinion, although he noted that he left the ultimate decision to Swink. Dr. Sprinkle noted that Swink wished to return to Dr. Shahim because he recalled that Dr. Shahim had told him that he thought he could fix the problem with surgery. Dr. Sprinkle left that decision to Swink's discretion.

Swink underwent a functional capacity evaluation in October 2004. It was determined that he demonstrated the ability to perform work at the heavy physical demand classification with limitations of overhead work.

In a note dated December 6, 2004, Dr. Shahim stated that he had given Swink the option of an anterior disc fusion at C6-7 because of the question of disc disease at that

level. He stated that he believed Swink had symptoms due to progression of the adjacent level disease and might benefit from an anterior fusion at C6-7.

An MRI of the cervical spine was performed on December 14, 2004, which showed the anterior cervical disc fusion at C5-6; minimal right paracentral protrusion at C4-5; mild stable left-sided foraminal narrowing at C3-4 secondary to asymmetric posterior marginal osteophyte and uncinate spurring; and no focal disc extrusion or central canal stenosis in the cervical spine. After the MRI, Dr. Shahim noted that Swink had disc herniation at C6-7, more to the left side, which was causing thecal-sac compression. He also noted spondylosis at C6-7, resulting in end-plate changes and foraminal stenosis. He stated that Swink had failed in using conservative management, including trigger-point injections, that he had given Swink the option of receiving cervical epidural steroid injections, but because of the severity of his symptoms, Swink desired to undergo surgery. Dr. Shahim noted that he did not expect an anterior decompression and fusion at C6-7 to completely eliminate the symptoms, but that it should certainly reduce the radicular pain.

In June 2005, Dr. Shahim noted that a review of Swink's MRI showed degenerative-disc disease at C6-7 below the prior fusion at C5-6 as well as foraminal stenosis. He ordered another CT cervical myelogram, which was performed on June 21, 2005, and indicated cervical spondylosis at C4-5 and C6-7; severe right and moderate left foraminal stenosis at C5-6 secondary to bony encroachment; severe right and moderate left foraminal stenosis at C6-7 secondary to uncovertebral osteophytes; and mild left foraminal stenosis due to ipsilateral facet hypertrophy. In an office note dated June 30,

2005, Dr. Shahim stated that the CT cervical myelogram showed bilateral foraminal stenosis at C6-7 due to a large osteophyte, more to the right side, and that the MRI showed progression of disc disease at C6-7.

Dr. Shahim performed the C6-7 decompression and fusion surgery on July 26, 2005. In August 2005, he noted that Swink continued to have significant axial neck pain. An MRI performed on September 26, 2005, showed postoperative changes at C5-6 and C6-7; no evidence of disc herniation or central canal stenosis; the right side neural foramina were widely patent; and mild-moderate foraminal narrowing for the exiting C6 and C7 nerve roots.

On September 27, 2005, Dr. Sprinkle stated that there was not any evidence in the claim that Swink sustained a new injury. He said that he would not conclude that the changes at C6-7 were likely related to Swink's 2003 injury because there was insufficient evidence to support a significant interval change. Dr. Sprinkle said that his opinion was further supported by the negative EMG for radiculopathy, and he opined that any future treatments for Swink's neck would be more related to his pre-existing degenerative disc disease than to any specific injury from the 2003 work-related injury. Dr. Sprinkle said that further fusion surgery down to C6-7 as proposed by Dr. Shahim might be of benefit for Swink's pre-existing degenerative disc disease, but he could not relate the need for that surgery to the 2003 injury. Dr. Sprinkle stated that he did not believe that there was a new disc herniation at C6-7, and he thought that there was sufficient objective evidence

to indicate that there was no significant interval change and no significant objective evidence to support any new disc herniations.

Dr. Shahim returned Swink to work on October 17, 2005, on light-duty status with no lifting over ten pounds and no repetitive twisting or bending. Dr. Shahim said if light-duty was not available, Swink was to remain off work until December 19, 2005, when he was again seen by him.

Commission Opinion

The Commission found that the preponderance of the evidence did not demonstrate that Swink's July 2005 C6-7 fusion surgery performed by Dr. Shahim was reasonably necessary in connection with the September 2003 injury. In so holding, the Commission stated that the record did not demonstrate that Swink suffered a herniated disc at C6-7 when he was injured in September 2003. While the Commission recognized that Dr. Shahim noted in a December 2003 report that an MRI showed a disc herniation at C6-7, it attached significant weight to the September 2005 expert opinion of Dr. Sprinkle, in which he opined that he would not conclude that the changes at C6-7 would likely be related to Swink's 2003 injury. Furthermore, Dr. Bruffett opined in June 2004 that Swink suffered from degenerative-disc disease, and that there was no indication that the 2003 injury caused the degenerative disease. Both Drs. Bruffett and Sprinkle opined that the surgery could very well make Swink's problems worse than they were prior to the surgery. Dr. Sprinkle found that Swink reached maximum medical improvement from a

non-surgical standpoint on September 14, 2004, and Riceland controverted any further benefits beginning September 15, 2004.

Swink argued to the Commission that he suffered an aggravation of a pre-existing condition. The Commission found that if the compensable injury was an aggravation, the aggravation would be in the form of a cervical strain, which resolved no later than September 14, 2004, when Dr. Sprinkle opined Swink was at maximum medical improvement. The Commission again stated that the record did not demonstrate that Swink suffered a herniated disc as a result of the 2003 injury. The Commission further noted that Dr. Shahim's reports from December 2004 forward did not describe a herniated disc from the 2003 injury but rather he discussed "disc disease" at C6-7. Lastly, the Commission noted that Swink testified that the only post-surgical improvement he had was a decrease in his medication.

The Commission also found that Swink was not entitled to temporary-total disability from July 28, 2005, to a date yet to be determined. Because the July 2005 surgery was not reasonably necessary in connection with the work-related injury, that surgery did not extend Swink's healing period beyond September 14, 2004, when Sprinkle determined that Swink had reached maximum medical improvement.

Compensability

On appeal, Swink argues that the Commission's opinion is not supported by substantial evidence and that the decision "has the effect of reversing an entire body of law" by finding that aggravations of preexisting conditions are not compensable. Swink

takes issue with the Commission's reliance upon Dr. Sprinkle's opinion rather than the opinion of his treating surgeon, Dr. Shahim. We disagree with these arguments.

The Commission's decision does not find that aggravations of preexisting conditions are not compensable. Rather, it relies upon Dr. Sprinkle's opinion that Swink's problems were not a result of the 2003 work-related injury. Swink also takes issue with the Commission crediting Dr. Sprinkle's opinion over that of Dr. Shahim's, but the Commission is entitled to believe or disbelieve medical testimony and when the evidence is conflicting, the Commission's determination is binding upon this court. This is an issue of the credibility of conflicting medical testimony, and the medical testimony the Commission chose to accept simply does not support Swink's position. We hold that there is substantial evidence to support the Commission's determination that Swink failed to prove that the C6-7 fusion was reasonably necessary in connection with his compensable injury.

Temporary-Total Disability

To be eligible for temporary-total disability, a claimant must be within his healing period and have a total incapacity to earn wages. *Fred's, Inc. v. Jefferson*, 89 Ark. App. 95, 200 S.W.3d 477 (2004). In *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 135, 84 S.W.3d 878, 882 (2002) (citations omitted), this court held:

> Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages; the healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. The determination of when the

> healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. These are matters of weight and credibility, and thus lie within the exclusive province of the Commission.

Swink argues that he was entitled to temporary-total disability from July 28, 2005, to a date yet to be determined. However, because the Commission determined that Swink did not prove that the surgery was reasonably necessary in connection with his compensable injury, and this court is affirming that decision, he is not entitled to temporary-total disability benefits for the period of time he was unable to work due to the second fusion surgery.

Affirmed.

BAKER and MILLER, JJ., agree.